The Honorable John C. Coughenour

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
SEATTLE

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| TIMOTHY LINEHAN, on behalf of Plaintiff and a class,<br><br>Plaintiff,<br><br>v.<br><br>ALLIANCEONE RECEIVABLES MANAGEMENT, INC.,<br><br>Defendant. | No. C15-1012-JCC<br>(Consolidated Actions)<br><br>RESPONSE TO DEFENDANTS' MOTION TO CERTIFY THE ISSUE TO THE NINTH CIRCUIT UNDER 28 U.S.C. §1292(b), AND FOR A STAY UNDER RULE 62[1]<br><br>Noted for Consideration: April 15, 2016 |

## I. INTRODUCTION

Defendants Merchant Credit Corporation ("Merchants"), Erik Bakke, and Jason

[1] This brief responds to Defendants' Motion to Certify Under 28 U.S.C. § 1292(b) and for a Stay under Rule 62, Dkt. 39 herein, originally docketed as Dkt. 96 in *Mosby et al. v. Merchants Credit Corp. et al*, W.D. Wash., under Case No. C15-1196-RSL.

Woehler (collectively "Defendants")[2] request the Court to "amend [Judge Robert S. Lasnik's] Order dated March 8, 2016 denying Merchants' Motion to Dismiss to grant permission for an immediate appeal…." ("Order").[3] Dkt. 85 in C15-1196-RSL. There are no substantial grounds for differences of opinion regarding Judge Lasnik's Order ("Order"), and an immediate appeal will not materially advance the ultimate termination of this litigation.

In the Order, Judge Lasnik determined as a preliminary matter that King County District Court's ("KCDC") General Administrative Orders ("GAOs") were preempted by the Fair Debt Collection Practices Act ("FDCPA") to the extent they are inconsistent with the FDCPA. *Id*. at 3. Defendants ***have never argued*** that preemption does not apply, nor have they based any of their arguments on demonstrating the GAOs are consistent with the FDCPA.

Judge Lasnik considered whether permitting actions to be filed by county would undermine the general purpose of the FDCPA, which is to eliminate abusive debt collection practices. *Id*. at 5-6. Turning to an analysis of case law regarding this issue, Judge Lasnik found that nearly all of the cases upon which Defendants relied were factually distinguishable or no longer good law. *Id*. at 6-7. Instead he concluded, "The relevant state authority and cases cited by plaintiffs persuade the Court that to give effect to the purposes of the FDCPA, it cannot conclude that "judicial district or other legal entity" simply means "county." *Id*. at 8.

Defendants ignore and fail to cite to this Court its recent ruling denying a near identical motion for interlocutory appeal in *Linehan v. AllianceOne Receivables Management, Inc.* (C15-01012-JCC, February 23, 2016, Dkt. 37). There, this Court specifically found that the

[2] There is an additional defendant is this matter, Robert Friedman, who is not represented by counsel for the defendants bringing this motion.

[3] The Order was entered in *Mosby, et al. v. Merchants Credit Corp., et al.* (formerly 2:15-cv-01196-RSL), which has now been transferred to this Court and consolidated into the present action.

defendant failed "…to show that a substantial ground for difference of opinion truly exists." *Id.* at 5.

Defendants also ignore that the current controlling complaint is Plaintiffs' Second Amended Complaint ("SAC") filed March 14, 2016, Dkt. 89 in C15-1196-RSL, which adds additional Plaintiffs and asserts a new claim under the Washington Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"), for which discovery will be required and, contrary to Defendants' claims, would not be affected by a ruling from the Ninth Circuit reversing Judge Lasnik's Order.

Certification of an interlocutory appeal is an exceptional remedy available only in unusual cases. Defendants have failed to identify a controlling question of law for appellate review, or to demonstrate a substantial ground for difference of opinion on any part of the Court's Order or how an immediate appeal will materially advance the litigation.[4] This Court should strictly construe 28 U.S.C § 1292(b) and deny Defendants' motion for certification of interlocutory appeal.

## II. BACKGROUND

This action was originally filed by Plaintiffs Mosby, Erickson, and Eskenazi ("Plaintiffs"), alleging that Defendants violated 15 U.S.C. § 1692i of the FDCPA by filing debt collection lawsuits in KCDC East Division located in Issaquah, Washington regardless of where the debtor defendants resided or signed the contracts sued upon. Defendants filed their Motion to Dismiss on August 27, 2015, making the following arguments:

[4] Plaintiffs respectfully acknowledge this Court has found that the issue here is a controlling question of law and that in *Linehan* an immediate appeal would materially advance the litigation. However, the *Linehan* matter does not involve the new CPA claim asserted by the Plaintiffs in their Second Amended Complaint.

1. Section 1692i of the FCDPA did not require Defendants to file in a courthouse near where debtor defendants resided because venue was proper in any court of the KCDC, which is a unified court whose boundaries are the same as King County.

2. A federal court may not, without violating principles of separation of powers, ignore a local state court's rules and procedures.

3. Defendants were required to file in Issaquah because of Local KCDC General Administrative Orders ("GAOs").

4. The Court was required to give full faith and credit to the GAOs, especially 13-10.

5. The "judicial district or similar legal entity" referenced in 1692i[5] is generally understood to mean "county".

Dkt. 14 in C15-1196-RSL. Judge Lasnik rejected these arguments. Dkt. 89 in C15-1196-RSL, at 3. Defendants now claim that Judge Lasnik's ruling "… effectively serves as an injunction prohibiting Defendants from pursing (sic) most debt collection cases in King County … [because] [t]he King County Court GAO permits the filing of debt collections actions in only two of the nine court locations." Dkt. 39 herein at 4. This claim is completely without merit.

First, Defendants do not cite the GAO that allegedly requires them to file debt collection actions in only two court locations.[6] Defendants never acknowledge that no GAO has ever required or otherwise designated where Defendant Merchants is to file cases. Indeed, Merchants is not even mentioned in the GAOs. Further, the GAOs only require certain attorneys to have matters "heard" in the KCDC East Division but do not prohibit them from filing in the proper venue. Finally, Defendants totally ignore that the FDCPA preempts state law, regardless of what KCDC local rules or state laws apply, as Judge Lasnik held. Dkt. 89 in C15-1196-RSL, at 3 (citing cases).

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[5] Any debt collector who brings any legal action on a debt against any consumer shall —
…
bring such action only in the judicial district or similar legal entity —
(A) in which such consumer signed the contract sued upon; or
(B) in which such consumer resides at the commencement of the action.

15 U.S.C. § 1692i(a)(2).

[6] Defendants state that "[t]he King County Court GAO permits the filing of debt collection actions by Defendants in only two of the nine [District Court] locations," but fail to specifically reference which GAO so provides. Dkt. 39 at 4.

After Judge Lasnik issued the Order granting Plaintiffs' motion to file their SAC, Defendants filed a new motion to dismiss. Dkt. 40 herein. That motion does not address the new cause of action asserted in the SAC, but instead makes arguments that could and should have been included in their first Motion to Dismiss.[7] The arguments are:

1. §1692i of the FDCPA is void for vagueness and therefore unconstitutional;
2. §1692i of the FDCPA violates the Tenth Amendment to the Constitution and principles of federalism because Congress does not have the power to prescribe rules for state-law claims in state court; and
3. Plaintiffs have failed to join an indispensable party, King County.

## III. DISCUSSION

Appeals are typically available only from a final judgment. *Couch v. Telescope Inc.,* 611 F.3d 629, 632 (9th Cir. 2010). Certification for an interlocutory appeal should be unusual and the requirements for certification should be construed strictly. *Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, 2015 WL 128042, at *4 (S.D. Cal. Jan. 8, 2015).

A movant seeking an interlocutory appeal has a heavy burden to show that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Weigand v. Cheung*, 2015 WL 7283127, at *3 (E.D. Wash. Nov. 16, 2015) (citing *Coopers v. Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S.Ct. 2454 (1978);

[7] Fed. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion"); Fed. R. Civ. 12(h)(2) & (3) (listing exceptions that do not apply).

*James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002)). "[Interlocutory appeal] was not intended merely to provide review of difficult rulings in hard cases." *U.S. Rubber Co. v. Wright,* 359 F.2d 784, 785 (9th Cir. 1966).

In order to qualify for certification for interlocutory appeal, an order must involve a controlling question of law as to which there is substantial ground for difference of opinion and the immediate appeal from the order must materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The requirements of § 1292(b) are jurisdictional and all required elements must be met. *Couch*, 611 F.3d at 633.

28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Because Section 1292(b) is a departure from the normal rule that only final judgments are appealable, the statute must be construed narrowly. *James v. Price Stern Sloan, Inc.,* 283 F.3d 1064, 1067 (9th Cir. 2002). For that reason, the statute requires a specific form for the district court's certification, and *de novo* review thereof by the court of appeals. In fact, courts of appeals "quite frequently" reject the district court's certification of an interlocutory appeal. *James,* 283 F.3d at 1067 n.6. Interlocutory appeal under § 1292(b) is reserved for "rare circumstances", *id.*, to be "applied sparingly," *U.S. v. Woodbury,* 263 F.2d 784, 788 n. 11 (9th Cir. 1959) (denying certification; stating court need not explain its reasons for doing so), in "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation." *U.S. Rubber Co.* 359 F.2d at 785 (vacating certification order).

Adhering to these requirements, district courts regularly reject motions for certification under Section 1292(b). *See, e.g., F.T.C. v. Swish Marketing,* 2010 WL 1526483 (N.D. Cal. April 14, 2010); *Sullivan v. Kelly Services, Inc.,* 2010 WL 1445683 (N.D. Cal. April 7, 2010); *Solis v. State of Washington,* 2010 WL 1186184 (W.D. Wash. March 24, 2010); *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, 2010 WL 952273 (D. Or. March 10, 2010); *Central Institute for Experimental Animals v. Jackson Laboratory*, 2010 WL 1240760 (N.D. Cal. March 26, 2010); *Hansen Beverage Co. v. Innovation Ventures, LLC.*, 2010 WL 743750 (S.D. Cal. Feb 25, 2010); *Spears v. Washington Mut. Bank FA*, 2010 WL 54755 (N.D. Cal. Jan 8, 2010); *Lucas v. Bell Trans.,* 2009 WL 3336112 (D. Nev. Oct. 14, 2009) (all denying certification). The principal case that Defendants rely upon, *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026-28 (9th Cir. 1982), ***rejected*** such a motion.

The party seeking certification of an interlocutory appeal has the burden to show exceptional circumstances that "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. at 474-75. Defendants have not shown this is one of those rare cases worthy of certification. They merely disagree with the Court's decision.

### A. DEFENDANTS HAVE FAILED TO IDENTIFY ANY SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

Courts traditionally will find that a substantial ground for difference of opinion exists under the following limited circumstances: the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, complicated questions arise under foreign law, or novel and difficult questions of first impression are presented. *Couch*, 611 F.3d *at* 633 (overturning certification order because the appellant had not provided the district court with any cases that conflicted with the district court's ruling). "The mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *Id.* at 634. A "party's strong disagreement with a court's ruling is not sufficient for" a "substantial ground for difference." *Haley v. TalentWise, Inc.*, 2014 WL 1648480, at *3 (W.D. Wash. Apr. 23, 2014).

In this case, there is no substantial ground for difference of opinion because Judge Lasnik's Order follows the only decisions on point. Specifically, Judge Lasnik recognized that his decision was in accord with this Court's decision on the same issue in this case where this Court adopted the Seventh Circuit's decision in *Suesz v. Med-1 Solutions Inc., LLC,* 757 F.3d 636 (7th Cir. 2014) (*en banc*), *cert. denied*, 135 S.Ct. 756 (2014), as persuasive authority (Dkt. No. 85 in C15-1196-RSL at 8). The *Suesz* court held that "the correct interpretation of 'judicial district or similar legal entity' in § 1692i [of the FDCPA] is the smallest geographic area that is relevant for determining venue in the court system in which the case is filed." 757 F.3d at 638. This Court also denied Defendant AllianceOne's motion for certification for interlocutory appeal, reasoning in part that there is no conflict between *Suesz* and the Ninth Circuit's decision in *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994), which holds individual counties in Arizona constituted different judicial districts under the FDCPA. (C15-1012-JCC, Dkt. 37 at 4).

Defendants have failed to identify any contrary opinions to those issued by Judge Lasnik and this Court. As Judge Lasnik noted, Defendants only cite cases that are factually distinct from this case or are no longer good law. *See* Dkt. 85 in C15-1196-RSL at 6-7. In fact, decisions construing the FDCPA's venue requirements have tended to limit the size of the area that qualifies as a "judicial district or similar legal entity" even if the "area" is less than a county or parish. *Nichols v. Byrd*, 435 F.Supp.2d 1101, 1108-09 (D. Nev. 2006) (requiring debt collectors to file in debtor's specific township within county); *Hess v. Cohen & Slamowitz* LLP, 637 F.3d 117 (2d Cir. 2011) (requiring debt collectors to file suit in debtor's particular city court within county); *Addison v. Braud*, 105 F.3d 223 (5th Cir. 1997) (requiring debt collector to sue in specific city within parish where debtor resided and signed contract); *Suesz*, 757 F.3d at 644, 647 (finding that "judicial district or similar legal entity" means "the smallest geographic area that is relevant for determining venue in the court system in which the case is filed").

Far from showing a difference of opinion, Defendants' motion demonstrates that Judge Lasnik's Order follows the prevailing trend. Defendants have failed in their burden to present a substantial ground for difference of opinion. At best, all that Defendants have presented is a disputed issue on which Defendants strongly disagree with the Court's ruling, a showing insufficient for certification. A party's disagreement with the Court's ruling will not satisfy the requirement of "a substantial ground for difference of opinion". *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, 2010 WL 952273, at *4 (D. Or. Mar. 10, 2010); *Hansen v. Schubert,* 459 F. Supp.2d 973, 1000 (E.D. Cal. 2006); *First Am. Corp. v. Al-Nahyan,* 948 F. Supp. 1107, 1116 (D.D.C. 1996) ("Mere disagreement, even if vehement, … does not establish a 'substantial ground for difference of opinion'…"); *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche,* 2007 WL 1119193, at *2 (N.D.Cal. Apr.16, 2007) ("Mere disagreement by a party with the court's holding is insufficient.").

Instead, the moving party must identify "a sufficient number of conflicting and contradictory opinions" that deal directly with the issue at hand. *Solis,* 2010 WL 1186184 at *3 (quoting *White v. Nix,* 43 F.3d 374, 378 (8th Cir. 1994)). Here Defendants have failed to identify any conflicting or contradictory opinions.

**B. DEFENDANTS HAVE NOT SHOWN GRANTING THEIR MOTION WILL MATERIALLY ADVANCE THIS LITIGATION.**

Since one of the central aims of § 1292(b) is to avoid unnecessary proceedings before a district court, Defendants must show that reversal will have some immediate effect on the course of litigation and result in some savings of resources. In other words, an interlocutory appeal must be likely to materially speed the termination of the litigation. Clearly, reversal will not have such an effect on Plaintiffs' CPA claim in this case. Plaintiffs should be permitted to pursue full discovery in connection with these newly filed claims, and to litigate them in as timely a manner as possible.[8]

Immediate interlocutory review is more likely to result in delay rather than any savings of time and resources. This is because Defendants advance no argument that non-interlocutory appellate review of this Court's final judgment would impose a harm beyond that "suffered by any litigant forced to wait until the termination of the trial before challenging ... orders [they] consider … erroneous." *Firestone Tire & Rubber Co. v. Rijsford,* 449 U.S. 368, 378 n. 13, 101 S.Ct. 669 (1981); *Swish Marketing,* 2010 WL 1526483, at *2. On the other hand, granting this motion would greatly delay the Plaintiffs' prosecution of their claims and may potentially subject them to a second time-consuming appeal at the termination of district court proceedings. For these reasons, the Court should permit the parties to complete this case at the trial court level, and then let Defendants appeal in the ordinary course if they so choose.

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[8] Defendants contend that "Plaintiffs have now subpoenaed many King County District Court Judges[.]" Dkt. 39 at 9. Defendants provide no evidence in support of this claim, nor can they, because the allegation is false. Plaintiffs have not "subpoenaed" any KCDC judges.

In conclusion, the Court should deny the Defendants' motion to certify and for a stay in its entirety.

DATED: April 11, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who receive CM/ECF notification.

Dated: April 11, 2016

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